

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

JOHN R. LANKFORD,

Plaintiff,

v.

CSX TRANSPORTATION, INC., et al.,


Defendants.

RECOMMENDATION

07-CV-6264L

Defendants CSX Transportation, Inc. and Consolidated Rail Corp. having filed a motion to dismiss based upon plaintiff's failure to comply with discovery obligations (Docket # 57), and such motion having been referred to the undersigned by the Hon. David G. Larimer, United States District Judge pursuant to 28 U.S.C. § 636(b), and oral argument of defendants' motion having been conducted before this Court on November 13, 2008, it is hereby

The RECOMMENDATION of this Court that, for the reasons more fully addressed during oral argument, defendants' motion to dismiss (**Docket # 57**), should be **DENIED**.



MARIAN W. PAYSON
United States Magistrate Judge

Dated: Rochester, New York
November 13, 2008

Pursuant to 28 U.S.C. § 636(b)(1), it is hereby

ORDERED, that this Report and Recommendation be filed with the Clerk of the Court.

ANY OBJECTIONS to this Report and Recommendation must be filed with the Clerk of this Court within ten (10) days after receipt of a copy of this Report and Recommendation in accordance with the above statute, Fed. R. Civ. P. 72(b), 6(a) and 6(e) and Local Rule 72.3(a)(3).

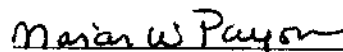
The district court will ordinarily refuse to consider on *de novo* review arguments, case law and/or evidentiary material which could have been, but was not, presented to the magistrate judge in the first instance. *See e.g. Paterson-Leitch Co., Inc. v. Massachusetts Mun. Wholesale Elec. Co.*, 840 F.2d 985 (1st Cir. 1988).

Failure to file objections within the specified time or to request an extension of such time waives the right to appeal the District Court's Order. *Thomas v. Arn*, 474 U.S. 140 (1985); *Small v. Secretary of Health and Human Servs.*, 892 F.2d 15 (2d Cir. 1989); *Wesolek v. Canadair Ltd.*, 838 F.2d 55 (2d Cir. 1988).

The parties are reminded that, pursuant to Rule 72.3(a)(3) of the Local Rules for the Western District of New York, "written objections shall specifically identify the portions of the proposed findings and recommendations to which objection is made and the basis for such objection and shall be supported by legal authority." **Failure to comply with the provisions of Rule 72.3(a)(3), or with the similar provisions of Rule 72.3(a)(2) (concerning objections to a Magistrate Judge's Decision and Order), may result in the District Court's refusal to consider the objection.**

Let the Clerk send a copy of this Order and a copy of the Report and Recommendation to the attorneys for the Plaintiff and the Defendant.

IT IS SO ORDERED.



MARIAN W. PAYSON
United States Magistrate Judge

Dated: Rochester, New York
November 13, 2008